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April 22, 1993

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APR 22 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

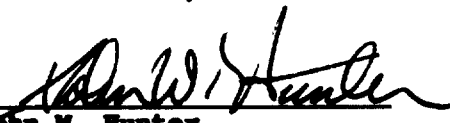
Dear Ms. Searcy:


Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Motion to Certify Questions to the Commission."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: 
John W. Hunter

By: 
Stephen T. Yelverton

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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MOTION TO CERTIFY QUESTIONS TO THE COMMISSION

Introduction

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.115(e)(3) of the Commission's Rules, hereby submits this "Motion to Certify Questions to the Commission." The motion results from Hearing Designation Order, DA 93-423, released April 15, 1993 ("HDO"), which was issued by the Chief, Audio Services Division, pursuant to delegated authority. The motion is timely filed pursuant to Sections 1.4(g) and 1.115(e)(3).

Review of the HDO before the Commission is requested because the action taken pursuant to delegated authority is in direct conflict with established Commission precedent and policy. See, Section 1.115(b)(2)(i). The HDO contains egregious errors as to controlling questions of law which require immediate consideration. Such immediate consideration would materially expedite the ultimate resolution of this proceeding. See, Section 1.115(e)(3). In support of its motion, ORA submits the following comments.

Statement of the Case

ORA filed on March 26, 1992, and supplemented on July 29, 1992, and January 25, 1993, petitions to deny and dismiss against David A. Ringer ("Ringer"), ASF Broadcasting Corp. ("ASF"), Wilburn Industries, Inc. ("Wilburn"), Kyong Ja Matchak ("Matchak"), and Shellee F. Davis ("Davis"). It contended that these applications must be dismissed with prejudice because they propose a short-spacing of 6.84 km. ORA proposes a fully-spaced and technically suitable tower site, which the competing parties have not contested.

Under long-established Commission policy with respect to comparative hearings, when an applicant is short-spaced and at least one applicant in the proceeding is fully-spaced and no question is raised as to the availability or technical suitability of the fully-spaced site, the short-spaced applicant will not be designated for hearing and will be immediately dismissed. Jemez Mountain Broadcasters, 7 FCC Rcd 4219, 4220, paras. 2 and 12 (1992); Payne Communications, Inc., 1 FCC Rcd 1052, 1053, paras. 6, 9-10 (Rev. Bd. 1986), aff'd, Evergreen Broadcasting Co., 6 FCC Rcd 5599, 5605, n. 3 (1991); Naguabo Broadcasting Co., 6 FCC Rcd 4879, para. 5 (1991); Madalina Broadcasting, Inc., 6 FCC Rcd 2508,

2509, paras. 3-5 (MMB 1991); Valley Radio, 5 FCC Rcd 4875, 4876, para. 5 (MMB 1990); Donavan Burke, 104 FCC2d 843 (1986); Megamedia, 67 FCC2d 1527 (1978); Clearlake Broadcasting Co., 47 Fed. Reg. 47931 (1982); and North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (1985) (all of the cited cases will hereinafter be referred to as the "North Texas" policy or line of cases).

The applications in this proceeding were filed for a channel which was allocated years ago. The allotment is now vacant because the license was deleted as a result of denial of the renewal application. The short-spaced applicants are proposing the use of the existing tower of the deleted licensee. That station was short-spaced to Station WTTF-FM, Tiffin, Ohio, but was "grandfathered" under Section 73.213. On September 11, 1992, Station WTTF-FM filed informal objections to the attempt to reinstitute the short-spacing caused by the deleted and defunct station.

In opposing ORA's petition to deny and dismiss (and Station WTTF-FM's objections), Ringer, ASF, Wilburn, Matchak, and Davis contended, without citing any case precedent, that the "North Texas" policy and line of cases does not apply to them because they filed their applications pursuant to Sections 73.213 and/or 73.215. According to these applicants, they are entitled to the same "grandfathering" rights under Section 73.213 as the deleted licensee regardless of the fact that they have no privity with the deleted licensee and/or that the directional antenna provisions of Section 73.215 can be used at a short-spaced tower site regardless of the fact that fully-spaced and technically suitable sites are available. One of the applicants acknowledged that it relied on the informal advice of a Commission staff member that the applications for Westerville could be filed at the short-spaced site of the deleted licensee, pursuant to Sections 73.213 and/or 73.215, without risk of being dismissed.

Discussion

The HDO, in denying ORA's petitions, failed to discuss or even to cite the "North Texas" policy and line of cases. Rather, it relied on EZ Communications, Inc., DA 93-361, released April 5, 1993, for the novel proposition that new

applicants could assume the short-spacing of a deleted licensee. EZ is a hearing designation order adopted under delegated authority by the Chief, Audio Services Division. However, the Commission staff has no legal authority to change, overrule, make up its own policy, or ignore Commission policy and precedent. See, Section 0.283(b). The staff is required to faithfully follow Commission policy and precedent. RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (1981).

Even if a hearing designation order adopted under delegated authority could overrule Commission policy and case precedent, the staff's reliance in the HDO, at para. 8, on EZ Communications, Inc. is misplaced. That case has no applicability or relevance to the facts and legal issues in this proceeding. EZ is a renewal case where a short-spaced incumbent licensee sought to dismiss a challenger which also proposed a short-spaced tower site.

In EZ, at para. 17, the staff ruled that the challenger could propose a short-spaced tower site equivalent or less short-spaced than the short-spaced incumbent licensee. That result was mandated by Royce International, 2 FCC Rcd 1368 (1987), which is a renewal case. Here, the instant proceeding is not a renewal case, there is no existing licensee, and there is no unavailability of fully-spaced tower sites.

The HDO, at paras. 8-9, and n. 5, also erred in holding that under Section 73.215, applicants could specify short-spaced tower sites without demonstrating the unavailability of fully-spaced sites. In MM Docket No. 87-121, 6 FCC Rcd 5356, 5360, para. 27 (1991), the Commission ruled that applications would be granted under Section 73.215 only in those exceptional cases where no fully-

is no longer applicable. The strained rationalization of the HDO in attempting to distinguish Salov is unavailing. The Commission's holding in Salov by its own language is applicable to all allotments and not just to some allotments. Moreover, there is no logical reason to limit Commission policy in this respect. The staff is again attempting to improperly ignore, change established Commission policy, or make up its own policy.

The HDO, at para. 11, erred in holding that Davis need not obtain the consent of Station WTTT-FM to increase power from 3 kw to 6 kw. Section 73.213(c)(2) requires such consent. The fact that Davis will purportedly not increase radiation toward Station WTTT-FM is legally irrelevant. In MM Docket No. 88-375, 6 FCC Rcd 3417, 69 RR2d 303, 307, para. 19 (1991), the Commission held that consent under Section 73.213 is not "negotiated acceptance of interference." Rather, it is an acknowledgement of the proposed modification and a statement that the modification is not objectionable.

The reliance of the HDO, at para. 11, on MM Docket No. 88-375, 6 FCC Rcd 3417, supra, for the proposition that short-spaced stations can increase power without the consent of the mutual short-spaced station is misplaced. The language quoted, at paras. 39-40, is only in the context of whether short-spaced stations increasing power in a direction away from the mutual short-spaced station are required to reduce existing interference to the mutual short-spaced station. The Commission held that it will permit facilities enhancements under Section 73.213 and will allow that station to retain current coverage in directions where overlap exists. Thus, this holding is legally and factually irrelevant to the instant proceeding.

Davis is not eligible to use Section 73.213(c)(1), which requires no consent. That provision, by definition, only applies to omnidirectional 3 kw operations.

The HDO, at para. 12, and n. 8, erred in holding that amendments filed by Matchak and Davis after the March 9, 1992, date for amendments of right were timely filed. These amendments were initially date stamped March 10, 1992.

After ORA raised this issue, the Commission staff back-dated the receipt date to March 9, 1992. The HDO's explanation of these mysterious and behind the scene maneuvers raises more questions than it answers. ORA and the other competing applicants have a right to know the total circumstances of how and why the date stamp on these amendments were changed after the fact from March 10 to March 9. See, Section 1.1208(b)(1). The HDO is silent on this crucial issue. Until these questions are fully answered, Matchak and Davis must receive no benefit for their basic or comparative qualifications from these late-filed amendments.

The HDO, at n. 8, erred in holding that Davis did not violate the ex parte rules by communicating with the staff before filing as to the merits of her short-spaced application. Section 1.1208(b)(1) prohibits such contact if the applicant intends to file a mutually exclusive application which would cause the proceeding to become restricted. Accord, MM Docket No. 86-225, 2 FCC Rcd 3011, 3023, para. 88 (1987).

WHEREFORE, in view of the foregoing, the applications of Ringer, ASF, Wilburn, Matchak, and Davis are impermissibly short-spaced and must accordingly be dismissed with prejudice. If the applications of Matchak and Davis are not dismissed, their amendments filed on March 10, 1992, must not be accepted for purposes of enhancing their basic or comparative qualifications.

The Presiding Judge is urged to certify these questions to the Commission

CERTIFICATE OF SERVICE

I, John W. Hunter, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 22nd day of April, 1993, I have caused to be mailed, U.S. mail, postage prepaid, a copy of the foregoing "Motion to Certify Questions to the Commission" to the following:

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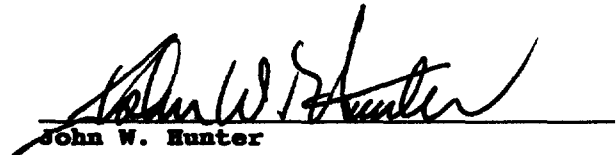
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